

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
COFMEG REALTY CORP.	:	DETERMINATION
	:	DTA NO. 812680
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Cofmeg Realty Corp., c/o Maria Coffinas, Esq., 16 Court Street - Suite 3500, Brooklyn, New York 11241, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On April 28, 1994, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.5(b)(5). On May 19, 1994, the Division of Taxation by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel) submitted documents in support of dismissal. Thereafter, on May 27, 1994, petitioner by its president, Maria Coffinas, Esq., submitted comments in opposition to dismissal. After due consideration of the comments and documents submitted, Winifred M. Maloney, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals.

FINDINGS OF FACT

Petitioner, Cofmeg Realty Corp., sold 8315 4th Avenue, Brooklyn, New York.¹ A Notice of Determination (L002470852) was issued on May 9, 1991.

Petitioner timely requested a conciliation conference.

¹The record is silent as to the sale date, purchaser and sales price.

A Bureau of Conciliation and Mediation Services ("BCMS") conference was held on December 10, 1992. Petitioner appeared by its president, Maria Coffinas. A Conciliation Order (CMS No. 116971), dated November 26, 1993, was issued which denied the request and sustained the statutory notice (L002470852-5).

In a letter addressed to the Division of Tax Appeals, dated December 2, 1993, Ms. Coffinas requested a petition form as well as the Rules of Practice and Procedure of the Tax Appeals Tribunal.

By letter dated December 6, 1993, the Division of Tax Appeals advised Ms. Coffinas as follows:

"Your request for forms does not constitute a petition under the Tax Law nor does it extend the time limits for filing."

Enclosed were petition forms and the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Petitioner filed a petition with the Division of Tax Appeals dated March 1, 1994 and signed by Maria Coffinas, president, by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated March 9, 1994. The petition was received by the Division of Tax Appeals on March 14, 1994.

A cover letter from Maria Coffinas, president of Cofmeg Realty Corp., addressed to the Division of Tax Appeals accompanied the petition. In this letter, Ms. Coffinas states that she did not have a copy of the Conciliation Order and was therefore enclosing copies of the proposed consent.

Petitioner is seeking a revision of a determination which assessed real property transfer gains tax. The petition challenges the assessment of \$187,813.00 in tax, plus interest and penalties. The petition states, inter alia, that the Commissioner failed: (1) to consider the fact that no gain was realized "in the transaction involving the sale by petitioner" because the purchaser has failed to pay any part of the sales price except for approximately \$250,000.00, and has filed Chapter 11 bankruptcy proceedings; and (2) "to properly credit the payments made

and still due with regard to the construction financing."

By notice dated April 28, 1994, the Division of Tax Appeals advised petitioner as follows:

"You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

"Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within 90 days from the date a Conciliation Order is issued.

"The Conciliation Order was issued on November 26, 1993 but the petition was not mailed until March 9, 1994 or one hundred and three days later.

"Pursuant to section 3000.5(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, you are hereby given 30 days to submit written comments on the proposed dismissal."

Copies of this notice were sent to the Division of Taxation ("Division") and to Maria Coffinas, Esq.

On May 23, 1994, the Division of Tax Appeals received the Division's written comments concerning the Notice of Intent to Dismiss. Included therein were affidavits of Joseph Chyrywat and Daniel B. LaFar, a copy of the BCMS certified mail record for November 26, 1993, and a copy of the Conciliation Order dated November 26, 1993.

Joseph Chyrywat is the Supervisor of Tax Conferences in BCMS. His affidavit sets forth the custom and practice in the preparation and mailing of conciliation orders.

In his affidavit, Mr. Chyrywat stated that, as part of his regular duties as Supervisor of Tax Conferences, he is fully familiar with the operations and procedures of BCMS. He indicated that the word processing unit of BCMS prepares conciliation orders and "Certified Mail Records" ("CMR"), which are listings of taxpayers to whom conciliation orders are sent by certified mail on a particular day. He also indicated that each page of a CMR is a separate and individual CMR for the conciliation orders listed on that page and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and "Total Number of Pieces Received at Post Office" for conciliation orders listed on just that page. There is also a space on each individual CMR for the receiving postal employee to sign.

Mr. Chyrywat explained that both the conciliation orders and the CMR(s) are sent to a

clerk who verifies the names and addresses on envelopes with the CMR(s). She also assigns a sequential "certified control number" to each envelope and lists it on the CMR next to the appropriate addressee's name. Mr. Chyrywaty further explained that the conciliation orders and the CMR are then picked up by an employee of the Division's mailroom.

Attached to Mr. Chyrywaty's affidavit as Exhibit "A" are the three pages of the CMR containing a list of the conciliation orders allegedly issued by BCMS on November 26, 1993, which he asserts bears the information relating to petitioner's order and is a true and accurate copy of such record.² He identified the Conciliation Order mailed to petitioner as listed on page 2 of the three-page CMR and that the certified control numbers run consecutively, except certified number P8438300081 was not listed or used, for the three pages. He also indicated there were no deletions from the three-page CMR.

The mailing record submitted is as follows: on each page is the caption which lists the name and address of the sender as BCMS, CMR "conciliation orders issued November 26, 1993." It lists in table form for each item sent the certified number, the name and address of the addressee, the postage, the fees and has a space for remarks. The information listed on page 2 of the CMR for petitioner is Certified No. P843830080, Cofmeg Realty Corp., c/o Maria Coffinas, 16 Court Street, Brooklyn, NY 11241. Across the bottom of each page are spaces for: total number of pieces listed, the number of pieces received by the post office and the name of the post office's receiving employee. Review of the bottom of page 2 of the CMR indicates that the numbers written in are "12" and that the postal representative's signature is illegible. Each page of this three-page CMR is date stamped November 26, 1993 by the Albany, New York, Roessleville Branch of the United States Postal Service, although the postmark is somewhat faint and slightly illegible.³

²Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

³On page 2 of the CMR, the date of November 26, 1993 is clear; Albany, NY is somewhat faint; "Roessleville BR" is somewhat illegible; the remainder of the postmark is illegible.

Mr. Chyrywat further indicated that the Division's mailroom returned a copy of the postmarked CMR to BCMS and that the CMR is kept in BCMS as a permanent record.

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include the supervision of mailroom staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on November 26, 1993.

Mr. LaFar noted that after a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the staff weighs and seals each envelope; postage and fees are affixed and the postage and fee amounts are recorded on the CMR. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the CMR indicating receipt by the U.S. Postal Service and it is returned the following day to the originating office within the Division (here BCMS).

The LaFar affidavit affirms that on November 26, 1993, an employee of the mailroom delivered a sealed, post-paid envelope for delivery by certified mail addressed to Cofmeg Realty Corp., "c/o Maria Corrinas [sic]", 16 Court Street, Brooklyn, NY 11241 to the Roessleville Branch of the U.S. Postal Service in Albany, New York.

On May 31, 1994, the Division of Tax Appeals received from petitioner its written comments, which consisted of a two-page document entitled "Opposition to Intent to Dismiss Petition" signed on its behalf by Maria Coffinas.

Ms. Coffinas asserts in her opposition that "the date of the signed conciliation order does not by itself constitute the date of issuance of the order." She states that she was pregnant when the order was issued, and that she experienced a very difficult pregnancy, which included

confinement to bed with a home monitoring machine, prior to the birth of her son on April 26, 1994. She contends that due to her medical difficulties, which kept her out of her office for "a great period of time", she was not aware that the 90 days had lapsed. She maintains that in early March she "suddenly remembered this matter and immediately arranged" for her office to mail the petition.

Lastly, Ms. Coffinas asserts that the petition sets forth a meritorious basis for the request for revision of the determination. Furthermore, she contends that:

"It would be unfair and unjust for the petition to be dismissed on a technicality when the merits have not been addressed.

"The equities mandate that the petitioner be afforded the opportunity to be heard."

OPINION

A. Tax Law § 170(3-a)(e) provides that:

"A conciliation order shall be rendered within thirty days after the proceeding is concluded and such order shall, in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued, notwithstanding any other provision of law to the contrary."

B. Tax Law § 170(3-a)(e) provides that a Conciliation Order is binding on the parties unless the taxpayer files a petition for hearing with the Division of Tax Appeals within 90 days after the order is issued. The order is issued at the time of its mailing to the taxpayer (Matter of Wilson & GSA Corporation d/b/a GSA Partners, Tax Appeals Tribunal, July 13, 1989). When addressing a proof of mailing issue, the Division may prove the fact and date of mailing by establishing the use of a standard mailing procedure for conciliation orders by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order in this case (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax

Appeals Tribunal, May 23, 1991; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533).

C. The Division has established through the affidavits of Messrs. Chyrywaty and LaFar that the Conciliation Order was issued and sent by certified mail on November 26, 1993 to petitioner. In addition, the Division has also submitted a copy of the BCMS CMR for November 26, 1993 as proof of mailing.

I find that the CMR in this case is substantially the same as the Postal Form 3877. Listed on page 2 of this CMR is the certified number, name and address of petitioner, the date, postmark and the signature of a postal employee acknowledging receipt. As the Tribunal noted in Matter of Montesanto (supra):

"As we discussed in Katz and Clark, a properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified because it contains on one page the name and address of the taxpayer, the taxpayer's representative, the date, postmark and the signature of a Postal Service employee acknowledging receipt."

The Division has established November 26, 1993 as the date of mailing of the Conciliation Order to petitioner.

D. Since the Division has proven it mailed the order, it is entitled to the presumption of receipt by the person to whom it was addressed (Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643) unless petitioner rebuts the presumption by showing that it did not receive the order. Although petitioner did assert that the date of the signed Conciliation Order did not by itself constitute the date of issuance of the order, it did not elaborate on that assertion. Petitioner did not deny it received the order.

E. Petitioner's president asserts that a reasonable excuse exists for the filing of the late petition and, therefore, the petition should be deemed timely. She contends that she was unaware that the 90 days had lapsed because of the medical problems associated with her very difficult pregnancy. Petitioner's argument is without merit. The late filing of a petition cannot be excused by illness or extenuating circumstances (see, Matter of Perillo, Tax Appeals

Tribunal, August 2, 1990; Matter of Rathgaber, Tax Appeals Tribunal, April 5, 1990).

Furthermore, the filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]).

F. As noted in Conclusion of Law "A", a Conciliation Order is binding on the parties unless the taxpayer files a petition for hearing with the Division of Tax Appeals within 90 days after the order is issued. The petition herein was filed with the Division of Tax Appeals on March 9, 1994. The last day on which petitioner could have timely filed a petition with the Division of Tax Appeals was February 24, 1994. Accordingly, the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case.

G. It is ordered that the petition of Cofmeg Realty Corp. be, and the same is hereby dismissed.

DATED: Troy, New York
July 28, 1994

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE